UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	*Criminal No. 89-00061 P*
	)	
GERALD BOULAY and	)	
EDWARD RIVARD,	)	
	)	
Defendants	)	

RECOMMENDED DECISION ON MOTIONS TO SUPPRESS

On October 18, 1989 the Grand Jury charged the defendants in a two-count Indictment with conspiracy to possess, possession of, and aiding and abetting the possession of, all with intent to distribute, a substance containing cocaine in violation of 21 U.S.C. '' 841(a)(1) and (b)(1)(C) and 18 U.S.C. ' 2. Each of the defendants has filed motions to suppress tangible and oral evidence obtained on August 7, 1989. An evidentiary hearing was held before me on January 4, 1990. The last of the legal memoranda was filed on February 12, 1990. I recommend that the following findings of fact be adopted and that the motions to suppress be ***DENIED***.

I. Proposed Findings of Fact

At approximately 12:30 a.m. on August 7, 1989, a very hot and muggy night, an on duty and uniformed patrolman for the Town of Kittery, Maine, Charles Denault, pulled his marked cruiser into the well-lit Maine Information Center commuter parking lot in Kittery just off the interstate where he

observed, initially from a distance of approximately 75 feet, an individual who was sitting in the front passenger seat of a properly parked two-door vehicle look in his direction, bring his clenched fist toward his mouth, tilt his head back and then bring his hand down to his side. Tr. 7-8, 11, 31, 46. He then observed the individual who was sitting in the driver's seat bring a Budweiser beer can toward his mouth, drink from it, look in the officer's direction and then bring his hand back down to his side. Tr. 9. On the basis of these observations the officer concluded that the Maine law which prohibits public drinking had been violated and pulled up to the parked vehicle with the intention of advising the occupants not to drink in public, checking for prior warnings and possibly issuing warnings. Tr. 9-10. As he did so he observed both individuals begin to move around; the front seat passenger turned his body toward the rear seat and then sat back up. Tr. 10. The officer approached the vehicle and spoke to both occupants through the open driver's side window. Tr. 10-11. At this time he detected a very strong odor of a burnt substance which he did not recognize and therefore did not associate with any other violations of law. Tr. 11. He also observed an open Budweiser beer can in plain view between the two front seats, advised the occupants of the public drinking law and asked them for identification. Tr. 11, 51. The individual sitting in the passenger seat identified himself as Gerald Boulay by presenting his Maine driver's license. *Id.* The person sitting behind the driver's wheel stated that his name was Edward Rivard but presented no identification, explaining that his driver's license was suspended. Tr. 12.

While Rivard appeared normal and was polite, Boulay was at the same time sweating heavily and shivering. *Id.* He also nodded a few times. *Id.* Nevertheless, he appeared able to understand what Officer Denault was saying to him and effectively responded to his questions. Tr. 12, 21, 73. Believing that Boulay was drinking and that there was another beer in the vehicle beside the one he observed between the two front seats, the officer asked Boulay where his beer was. Tr. 12-13. Boulay

replied, ``What beer?" At this time the officer scanned the interior of the vehicle with a flashlight checking for any opened beers and possible weapons, and observed in the back seat in a location closest to the driver's sidewall a large closed picnic cooler and a closed small thermos. Tr. 13. He then returned to his cruiser to begin the standard public drinking warning check and license check. Tr. 13-14. Having found no record of that these individuals had previously been given public drinking warnings, it was then his intention to issue warnings, to secure all unopened beer by placing it in an area -- such as the trunk -- not immediately accessible to the occupants of the vehicle and to pour out any opened beers to insure that the violation of drinking in public would cease. Tr. 14-15, 53-54.

While still sitting in his cruiser Officer Denault observed Boulay turn around and reach into the back of the vehicle, apparently to move something. Tr. 15. From this he concluded that Boulay was possibly attempting to hide the beer he had not yet found or to secrete other evidence of a violation of the public drinking law. *Id.* He then observed both Boulay and Rivard begin to smoke cigarettes and blow smoke throughout the vehicle in an unusual manner filling the interior of the vehicle with smoke. Tr. 16. Officer Denault next observed Boulay look up at him and, aware that the officer was watching him, began to stretch and start moving back into the front seat. *Id.* As Officer Denault ran back toward the vehicle to begin to write out warnings, he observed Boulay again reach into the back of the vehicle and move something. *Id.* When the officer walked up to the driver's side of the vehicle he saw that the opened beer was still between the seats and asked whose beer it was. Tr. 16. Boulay answered, ``What beer?" Tr. 16. Rivard said the beer was his. *Id.* The officer then asked Boulay where his beer was, and Boulay responded: ``What beer? I don't have any." *Id.* Having observed that the cooler in the back seat had been moved more than halfway toward the passenger's wall and that the thermos had been placed halfway under the rear part of the driver's seat,

the officer next asked Boulay what was in the cooler. Tr. 16-17. He replied: ``I don't know. Nothing. It's not mine." Tr. 17, 56-57. Officer Denault then asked Boulay if he would open the cooler. Tr. 18, 56-57. He said ``Sure," slid the cooler more toward the passenger side of the wall and away from Officer Denault, opened the lid, removed one unopened Budweiser beer which he placed on the seat and closed the lid again. Tr. 18, 57, 59. Boulay then said, ``There." Tr. 18. The officer, unable to see the interior of the cooler himself, said to Boulay, ``I'd like to see the bottom again, please," and in response Boulay again opened the cooler, withdrew another closed beer and said, ``There." *Id.* At this point, believing that an opened beer was still unaccounted for and that the cooler might contain other unopened containers of beer which should be secured in the trunk, Officer Denault told Boulay he wanted to see the bottom of the cooler. Tr. 18-19, 59-61. Boulay then lifted up the cooler and stated there was nothing more in there except a towel. Tr. 19. The officer then asked Boulay to lift up the towel because it was bulky. *Id.* As he did so a glass vial test tube measuring eight to nine inches in length fell onto the seat and rolled into the crack of the seat where it met the wall of the car. Tr. 19, 65. Officer Denault shined his flashlight on the vial and observed that it was wet and had something in it which he was not then able to identify. Tr. 19-20. The officer again asked Boulay to show him under the towel. Tr. 20. Boulay lifted the towel further and a butane canister fell out, landed on the seat and rolled onto the floor. *Id.* When Boulay was asked to lift the towel totally, he did so and Officer Denault found that under the towel was a black butane torch. *Id.* During this course of events Rivard remained silent. *Id.* When asked what those items were, Boulay said they belonged to Rivard. Tr. 21. Officer Denault then asked Rivard if the butane torch, canister and vial were his. *Id.* He stated that the torch and canister were, explaining that he used them at work. *Id.*

Officer Denault then observed Boulay trying to push the glass vial down between the seats. *Id.* The officer walked around to the passenger side of the vehicle whereupon Boulay opened the door.

Id. Officer Denault asked him what was in the vial. *Id.* Boulay responded, ``What vial?" Tr. 22. The officer shined his flashlight on the vial which was now resting on the floor of the rear passenger side of the vehicle and observed that it contained a wet, crystallized substance. *Id.* He reached in, grabbed it, showed it to Boulay and asked Boulay who owned it. *Id.* Boulay indicated he did not know. *Id.* At this point Officer Denault believed the vial contained crack cocaine and that the blow torch and butane canister had been used to manufacture crack as evidenced by the burnt odor he had detected earlier. Tr. 22-23. Satisfied that the defendants had violated Maine law prohibiting the possession of drug paraphernalia and possibly other drug laws as well, he called for backup. Tr. 23-24. To this point the ``stop" had taken a total of approximately six minutes. Tr. 24.

When backup arrived in the person of Patrolman Long, the two officers separated Boulay and Rivard and conducted patdown searches. Tr. 24-25. Officer Long removed a butterfly knife and a small green container from Rivard's person which, upon opening, he found contained three to four crack cocaine rocks. Tr. 25. The vehicle was searched incident to the arrest of the defendants during which Officer Denault found under the driver's seat another test tube and the thermos which he opened revealing a brown paper bag which contained two sandwich baggies full of a white powder substance. Tr. 26. Less than two minutes had elapsed between the arrest of the defendants and the commencement of the vehicle search. Tr. 27.

Officer Denault transported Rivard and Officer Long transported Boulay to the Kittery police station. Tr. 26-27. Officer Denault had no conversation with Rivard on the way to the station. Tr. 27. When they arrived at the station Officer Denault took Rivard to an upstairs conference room where he read him his *Miranda* rights at 1:58 a.m. *Id.* Rivard indicated he understood his rights and consented to talk to the officer, whereupon he made incriminating statements. Tr. 28-30. Boulay was thereafter brought to the same room, read his *Miranda* rights but did not make any statements. Tr. 29-

30. At no time after Officer Denault initially advised the defendants of the prohibition against public drinking did he observe either of them engage in further drinking. Tr. 50.

II. Legal Discussion

A. Standing

The government challenges the standing of both defendants to contest the validity of the search of the cooler. The burden of establishing standing is on the defendants. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Melucci*, 888 F.2d 200, 202 (1st Cir. 1989). To have standing the defendants must have had a legitimate expectation of privacy in the cooler at the time of the search. *Id.* Thus, each must establish that he exhibited a subjective expectation of privacy in the cooler and that the expectation was objectively reasonable. *Melucci*, 888 F.2d at 202; *United States v. Thornley*, 707 F.2d 622, 624 (1st Cir. 1983).

The government concedes that Boulay satisfies the ``subjective expectation" test, but argues that Rivard does not. I disagree. To satisfy the ``subjective expectation" requirement one need only make a *de minimis* showing. It is the second requirement --the objective reasonableness of a subjective privacy expectation -- that the Supreme Court has always emphasized. *Hudson v. Palmer*, 468 U.S. 517, 525 n.7 (1984). Here the cooler was closed, concealing its contents. It was located in an occupied vehicle access to which was controlled by the defendants. Although Rivard may have sat silently through the scenario in which the contents of the cooler were revealed piecemeal, the circumstances nevertheless indicate that he, like Boulay, was hiding contraband in the cooler in the

hope of keeping it away from Officer Denault.[1] I conclude that both Boulay and Rivard have satisfied the ``subjective expectation'' test.

I likewise conclude that the defendants' expectation of privacy in the cooler was objectively reasonable. They were legitimately in the private vehicle in which the cooler was located at the time of the search, as the government concedes. They were indisputably in possession and control of the cooler with the apparent ability to regulate access to it by others. The contents of the cooler were not in plain view. *See Melucci,* 888 F.2d at 202. Privacy expectations in such circumstances are fully compatible with societal norms. *See Hudson v. Palmer*, 468 U.S. at 525.

B. Legality of the Search

The defendants argue that the evidence recovered from the searches of the cooler, the thermos and Rivard should be suppressed for four reasons: (1) they did not consent to any of the searches; (2) Officer Denault lacked probable cause to search the contents of the cooler; (3) the vial containing the crack cocaine residue was not in plain view and its seizure was therefore illegal; and (4) the arrest and subsequent searches of the entire vehicle and of Rivard were based on the illegal search of the cooler and were invalid.[2]

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[1] I find that Boulay's disclaimer of any interest in the cooler was tactical and belied by the extent to which he exercised dominion and control over it as well as by his persistent reluctance in disgorging it contents.

[2] The defendants do not contest the legitimacy of the investigative stop. *See* Memorandum of Law in Support of Defendant Boulay's Motion to Suppress pp. 2, 5; Defendant Rivard's Memorandum of

Law in Support of Motion to Suppress p. 5.

On the subject of searches and seizures, Supreme Court cases hold ``that procedure by way of a warrant is preferred, although in a wide range of diverse situations [the Court has] recognized flexible, common-sense exceptions to this requirement." *Texas v. Brown*, 460 U.S. 730, 735 (1983) (plurality opinion); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). ``[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth*, 412 U.S. at 219. The government, however, has the burden of proving that the consent was freely and voluntarily given." *Id.* at 222.

Each of the items yielded from the cooler was produced by Boulay in response to Officer Denault's requests. *See* Supplementary Memorandum of Law in Support of Defendant Boulay's Motion to Suppress at p. 7. The government contends that Boulay's conduct in this regard amounted to consent to a search of the cooler. In order to determine whether the consent to search was free and voluntary the court must assess ``the totality of all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226; *United States v. Watson*, 423 U.S. 411, 424 (1976). This examination must take into account the subtly of coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.[3] *Schneckloth*, 412 U.S. at 229. The Supreme Court has held that a defendant's consent to a search is not coerced where there is ``no overt act or threat of force against [the defendant] proved or claimed . . . [or] promises made to him or . . . indication of more subtle forms of coercion that might flaw his judgment." *United States v. Watson*, 423 U.S. at 424. However, a defendant's initial refusal to comply with an officer's request to search his property does not necessarily affect consent to and later compliance with additional search requests. *Davis v. United States*, 328

[3] Boulay has intimated that his subjective state may have prevented him from fully comprehending the import of his actions. The government clearly established, however, that Boulay understood what Officer Denault was saying to him and effectively responded to his questions. Tr. 12, 21, 73. Furthermore, Boulay's actions confirm that he was not only aware of Officer Denault's requests, but

U.S. 582, 593-94 (1946). Furthermore, a defendant may manifest consent both in words and actions. *See United States v. Rodriguez Perez*, 625 F.2d 1021, 1024-25 (1st Cir. 1980) (defendant's statement that he had nothing to hide and his actions in leading officers to his hotel room both manifested his consent).

The defendants assert that the piecemeal display of the contents of the cooler demonstrates a lack of consent and that the officer's repeated requests to see the bottom of the cooler is evidence of the coercive nature of his conduct. Although Officer Denault made several requests that he be shown the bottom of the cooler, Boulay willingly, albeit hesitantly, complied with those requests. Nothing in the record shows acts or threats of force, promises to the defendants or more subtle forms of coercion. Thus, taking all the circumstances of the search into consideration, including Rivard's silent acquiescence in Boulay's conduct, I conclude that the defendants consented to the search of the cooler and that their consent was free and voluntary.

Even if the defendants did not so consent, I conclude for the following reasons that the warrantless search of the cooler was nonetheless lawful. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court articulated an exception to the traditional rule disallowing detention without probable cause. This exception ``has been widened in the last decade to encompass other circumstances where officers may make brief investigative stops or seizures of individuals upon reasonable suspicion that they may have committed, are committing, or are about to commit a crime." *United States v. Quinn*, 815 F.2d 153, 156 (1st Cir. 1987). The court reviewing such police action must inquire ```whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States v. Sharpe*, 470 U.S.

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that he understood their implications.

675, 682 (1985) (quoting *Terry v. Ohio*, 392 U.S. at 20); *United States v. Trullo*, 809 F.2d 108, 111 (1st Cir. 1987).

The defendants argue that, although Officer Denault's initial stop and investigation were warranted by his observation that the defendants were drinking in public, he lacked probable cause to continue the search into the contents of the cooler. The Court of Appeals for the First Circuit has defined probable cause as follows:

> Probable cause exists when ```the facts and circumstances within [the police officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" *United States v. Figueroa*, 818 F.2d 1020, 1023 (1st Cir. 1987) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). In other words, we consider the totality of the circumstances in evaluating whether the government demonstrated a sufficient ```[p]robability . . . of criminal activity,'" *id.* at 1023-24 (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). ``*Probability* is the touchstone. . . . [T]he government need not show `the quantum of proof necessary to convict.'" *Id.* at 1023 (quoting *United States v. Miller*, 589 F.2d 1117, 1128 (1st Cir. 1978)).

United States v. Jorge, 865 F.2d 6, 9 (1st Cir. 1989). I conclude that the facts and circumstances known to Officer Denault at the time of the search of the cooler were sufficient to warrant his belief that the defendants were violating Maine's public drinking law, and that he therefore had probable cause to search the cooler for open containers of liquor.

Maine's public drinking statute, 17 M.R.S.A. ' 2003-A, prohibits the consumption of liquor in any public place. It provides that any person drinking liquor in a public place will first be warned that such activity is a violation of the law. Any person who consumes alcohol in public after receiving this warning is guilty of a Class E crime. 17 M.R.S.A. ' 2003-A(2). Subsection (3) states that the possession of an open container of liquor in a public place is prima facie evidence of a violation of the statute. 17 M.R.S.A. ' 2003-A(3).

When he initially observed the defendants in what is admittedly a public place, Officer Denault saw both of them engage in movements which suggested they were drinking. Upon approaching their vehicle he saw an open can of beer between the two front seats and gave the defendants verbal warnings not to drink in public. Thereafter, while sitting in his cruiser to which he had returned to run record checks Officer Denault observed movements which indicated to him that the defendants were trying to hide something. These included furtive movements directed to the back seat and the highly suspicious activity of blowing cigarette smoke in such a way as to obscure the passenger compartment of the defendants' car from the officer's view. The officer concluded that the defendants were trying to hide a second open can of beer which, if so, in the aftermath of the earlier warning given them not to drink in public and the fact that the possession of an open can of beer in a public place is prima facie evidence of a violation of the statute, would have constituted a chargeable violation of the statute. When he returned to the defendants' car Officer Denault noted that the cooler had been moved from its original position closer to the passenger seat, an action which was consistent with his belief that the defendants were hiding a second open can of beer and which focused his attention once again on the cooler. Viewing the totality of the circumstances, I conclude that the government has ``demonstrated a sufficient probability of criminal activity." *United States v. Jorge*, 865 F.2d at 9. Armed with probable cause, Officer Denault was entitled to conduct a warrantless search of the cooler even if the defendants did not consent.[4] *United States v. Ross*, 456 U.S. 798 (1982).

Next, I consider the defendants' argument that the vial containing the crystallized cocaine residue was not in plain view and was illegally seized. A plurality of the Supreme Court has held that the ``plain view" doctrine:

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[4] I intimate no opinion as to whether Officer Denault would have had probable cause to conduct an unconsented to, warrantless search if his only concern were that the defendants were hiding *closed*

> permits the warrantless seizure by police of private possessions where three requirements are satisfied. First, the police officer must lawfully make an ``initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover incriminating evidence ``inadvertently," which is to say, he may not ``know in advance the location of [certain] evidence and intend to seize it," relying on the plain-view doctrine only as a pretext. Finally, it must be ``immediately apparent" to the police that the items they observe may be evidence of crime, contraband, or otherwise subject to seizure.

Texas v. Brown, 460 U.S. at 736-37 (plurality opinion) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion) (footnote and citation omitted)). The ``plain view" doctrine may be used to seize an object if ``access to [it] has some prior justification under the Fourth Amendment." *Id.* at 738. Thus, ``if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." *Id.* at 739.

This three-part test has been fully satisfied in this case. First, the defendants do not dispute that Officer Denault's initial intrusion was lawful. Second, there is no evidence that his discovery of the vial was pretextual. Finally, Officer Denault testified that once defendant Boulay opened his door and the vial came into plain view on the floor of the car he was immediately able to identify its contents as crack cocaine. Tr. 22-23. Therefore, I conclude that, whether the vial came into plain view as a result of a consented to search or a lawful investigative stop, its seizure was proper.

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containers of liquor.

Finally, because I conclude that the initial search of the cooler and the seizure of evidence therefrom were lawful, I also conclude that Officer Denault had probable cause to arrest the defendants and that the warrantless searches of the passenger compartment of the automobile, which also yielded baggies of a white powder from the thermos, and of Rivard's person, which yielded crack cocaine rocks, were properly conducted. *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 235 (1973). For the same reasons, I conclude that Rivard's statements, both prior to and after his arrest,[5] were not the fruits of an illegal search.

For the foregoing reasons, I recommend that the defendants' motions to suppress be ***DENIED***.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 9th day of March, 1990.

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[5] Rivard argues that the statements he made prior to his arrest concerning his ownership of the butane torch were illegally obtained in violation of his Fifth and Fourteenth Amendment rights. He asserts that he was in custody at the time he made the statements and that Officer Denault should have informed him of his *Miranda* rights. However, when Rivard made his initial statements concerning the blow torch and canister, Officer Denault was clearly still engaged in a *Terry* stop. *See United States v. Sharpe*, 470 U.S. at 685-86; *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *United States v. Streifel*, 781 F.2d 953, 958 (1st Cir. 1986). Only if the defendant's confinement is comparable to that of a formal arrest are the authorities required to inform him of his constitutional rights. *Berkemer v. McCarty*, 468 U.S. at 434, 439-40; *United States v. Streifel*, 781 F.2d at 958. There is nothing in the defendant's initial detention which exceeded the bounds of a permissible *Terry* stop. The duration and circumstances of the stop were fully consistent with ``a reasonable attempt to verify or dispel the [officer's] suspicions." *United States v. Streifel*, 781 F.2d at 959. Rivard does not argue that he was not properly *Mirandaized* after he was formally arrested and before he made further statements.

David M. Cohen
United States Magistrate